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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Criminal Case No. 08-CR-0366-DMS
)	
Plaintiff,	)	DATE: July 11, 2008
	)	TIME: 1:30 p.m.
v.	)	COURT: 10
	)	Honorable Dana M. Sabraw
JAMES HAYNES, III,)	
	)	UNITED STATES' RESPONSE IN
Defendant.	)	OPPOSITION TO DEFENDANTS'
	)	MOTIONS TO:
)	
	)	(1) SUPPRESS 404(B) EVIDENCE
	)	BECAUSE IT WAS
	)	UNCONSTITUTIONALLY
	)	OBTAINED
	)	(2) RECONSIDER ITS DENIAL OF
	)	THE MOTION TO SUPPRESS
	)	ALL EVIDENCE BASED UPON
	)	NEW EVIDENCE
	)	(3) DIRECT THE GOVERNMENT
	)	TO FILE A BILL OF
	)	PARTICULARS

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Aaron B. Clark and David D. Leshner, Assistant United States Attorneys, and hereby files its Response in Opposition to defendant James Haynes, III's motions. Said Response is based upon the files and records of this case together with the following memorandum of points and authorities.

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I**STATEMENT OF FACTS**

The facts germane to the specific motions before this Court are provided in detail below.

II**POINTS AND AUTHORITIES****1. THE 404(B) EVIDENCE SHOULD BE ADMITTED**

Defendant first contends that evidence of Defendant's November 28, 2007 apprehension, which the Government has moved to admit under Federal Rule of Evidence 404(b), must be suppressed because it was unconstitutionally acquired. [Deft's Mtn 2-8.] Defendant here errs on several levels.

A. The November 28, 2007 Incident

At approximately 9 p.m. on August 28, 2007, Defendant approached the S.R. 94 Checkpoint as the driver of a blue Toyota Corolla. There was one visible passenger in the vehicle, Michael Felix Mayfield. Defendant and Mayfield presented themselves for inspection at the checkpoint to Border Patrol Agent Ramiro Ramirez. Agent Ramirez noticed that both Defendant and Mayfield were "acting very nervous and overly cooperative." Agent Ramirez asked for permission to look inside the trunk, which Defendant granted. During his inspection of the trunk, Agent Ramirez found two individuals attempting to conceal themselves therein. Both individuals found in the trunk admitted to being citizens and nationals of Mexico. Neither had documents allowing them to be in the United States legally.

B. The Court is Not Required to Examine the Constitutionality of the Underlying Search

First, Defendant's argument all but ignores controlling Ninth Circuit precedent. The Court simply is not obligated to determine whether 404(b) evidence has been lawfully obtained. See, United States v. Lopez-Martinez, 725 F.2d 471 (9th Cir. 1984).

1 In Lopez-Martinez, the defendant was charged with importation of heroin. The district
2 court admitted evidence under Rule 404(b) of the defendant's prior arrest for possession of
3 marijuana eight years earlier in 1974, as well as evidence of statements he made following that
4 arrest. On appeal, the Ninth Circuit held the district court properly declined to conduct a hearing
5 on the legality of the prior arrest because "even if the 1974 arrest were illegal, the Fourth
6 Amendment exclusionary rule would not bar use of Lopez's 1974 post-arrest statement in his 1982
7 trial." Id. at 476. Furthermore, recognizing that the exclusionary rule "has never been interpreted
8 to proscribe the use of illegally seized evidence in all proceedings or against all persons," the Ninth
9 Circuit found no evidence "that the first investigation and prosecution might be planned to ensure
10 the success of the second." Id. (citation omitted). Thus, the arresting agents in 1974 did not have
11 the subsequent 1982 prosecution in their "zone of primary interest" when they made the allegedly
12 illegal arrest, and the exclusionary rule would not bar use of evidence from the prior arrest
13 regardless of any Fourth Amendment violation. Id.

14 The Ninth Circuit has since repeatedly applied the rule of Lopez-Martinez to reject the very
15 argument Defendant raises here. See, e.g., United States v. Medina, 181 F.3d 1078, 1082 (9th Cir.
16 1999) (district court properly declined to hold evidentiary hearing on lawfulness of prior arrests
17 leading to seizures of evidence used at trial – "Absent any threshold showing of a connection or
18 'nexus' in time, place, or purpose between the searches and the subsequent prosecution, there is no
19 appreciable deterrent purpose in suppressing the evidence."); United States v. Basinger, 60 F.3d
20 1400, 1407 (9th Cir. 1995) (trial court properly admitted evidence of prior apprehension under Rule
21 404(b) irrespective of claimed Fourth Amendment violation because evidence did not demonstrate
22 "bad faith or collusion" between officers involved in prior apprehension and the case at issue).

23 Indeed, Defendant inexplicably relegates to a single footnote his discussion of Lopez-
24 Martinez and its implications. [Deft's Motion at 2, fn. 1.] Describing the need for the exclusionary
25 rule here as "self-evident," he makes only passing reference to a threshold showing by pointing to
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1 the months between Defendant's arrests and the fact that both incidents involved "the very same
2 agency, conducting operations having the very same purpose." [Id.]

3 This meager showing falls far short of suggesting, much less establishing, that Defendant's
4 November 28, 2007 arrest "might [have been] planned to ensure the success of the [February 5,
5 2008 arrest.]" Lopez-Martinez, 725 F.2d at 476. Accordingly, absent such collusion, the
6 exclusionary rule does not bar evidence of Defendant's prior arrest, irrespective of whether it was
7 lawfully obtained, since "the additional measure of deterrence [in excluding evidence of the
8 November 2007 arrest] is too small to outweigh the cost to society of the loss of relevant and
9 probative evidence in the [current] proceeding." Id. Defendant's motion should therefore be
10 denied.

11 **C. The 404(b) Evidence Was Lawfully Obtained**

12 Even if Defendant had demonstrated a threshold nexus between Defendant's November
13 2007 and February 2008 arrests, the evidence arising out of the November 2007 arrest was lawfully
14 obtained.

15 The law is well settled that Border Patrol agents may stop every vehicle passing an
16 operational internal checkpoint, even in the absence of individualized suspicion. United States v.
17 Martinez-Fuerte, 428 U.S. 543, 562 (1976); See also United States v. Montoya de Hernandez, 473
18 U.S. 531, 538 (1985) ("Automobile travelers may be stopped at fixed checkpoints near the border
19 without individualized suspicion . . ."). Nor do agents need any individualized reasonable suspicion
20 in order to refer a vehicle from primary to secondary for further immigration inspection. Id.;
21 United States v. Soto-Camacho, 58 F.3d 408, 412-413 (9th Cir. 1995). In fact, any *potential*
22 immigration violation supports a referral to secondary. United States v. Preciado-Robles, 964 F.2d
23 882, 884 (9th Cir. 1992) ("Potential immigration violations support a secondary referral....even in
24 the absence of 'articulable suspicion.'") [internal citations omitted].

25 Of course, an arrest or search at an immigration checkpoint must be justified by either
26 probable cause or consent. Preciado-Robles, 964 F.2d at 885 (citing Martinez-Fuerte, 428 U.S. at
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567). Consent need not be knowing or intelligent, but must be voluntary, that is, it must not be the product of coercive police behavior that overbears the will of the individual. See United States v. Watson, 423 U.S. 411, 424 (1976); See also Preciado Robles, 964 F.2d at 885 (noting that consent must be freely given or voluntary) (citing Schneckloth v. Bustamante, 412 U.S. 218, 248-249 (1973)).

The Ninth Circuit has developed a “totality of circumstances” standard to determine whether consent is valid. In United States v. Cormier, 220 F.3d 1103 (9th Cir. 2000), the Ninth Circuit enumerated five *non-exclusive* factors relevant to this inquiry: (1) whether the defendant is in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given;^{1/} (4) whether the defendant was told she had the right not to consent; and (5) whether the defendant was told that a search warrant could be obtained. Id. at 1112.

Here, on November 28, 2007 Defendant was stopped a valid, operational checkpoint. The stop was therefore entirely proper. See Martinez-Fuerte, 428 U.S. at 562; Montoya de Hernandez, 473 U.S. at 538.

During the brief stop, Defendant gave valid consent to search his vehicle. Several factors support the fact that Defendant’s consent was freely given. First, Defendant was not in custody at the time he gave consent. United States v. Leasure, 122 F.3d 837, 840 (9th Cir. 1997) (“In most cases, the earliest a person could be in custody is at the point when she is moved into a secondary inspection area and asked to exit her vehicle while it is searched.”) Second, Border Patrol Agent Ramirez, the agent conducting the search, did not have his gun drawn, nor did the agent threaten Defendant in any way. Third, the agents did not Mirandize Defendant before he gave consent because he was not under arrest. Fourth, the brevity of the encounter further supports the conclusion that Defendant’s consent was voluntary. Defendant simply approached the checkpoint,

^{1/} After the Cormier decision, the Ninth Circuit cast doubt on the relevance of Miranda warnings, concluding that it is at best an “open to question . . . whether the inclusion or exclusion of Miranda warnings in a given set of circumstances should weigh much in either direction in considering voluntariness.” United States v. Perez-Lopez, 348 F.3d 839, 847 (9th Cir. 2003).

1 stated his citizenship, and unwittingly presented himself as “very nervous and overly cooperative”
2 to Agent Ramirez. Agent Ramirez thereafter asked for consent to look inside the trunk of the
3 vehicle. Defendant said “Yes.” Accordingly, the Defendant’s consent was voluntary, and the
4 search made no intrusion on Defendant’s Fourth Amendment rights.^{2/} Defendant’s Motion should
5 therefore be denied.

6 **2. THE MOTION TO RECONSIDER SHOULD BE DENIED**

7 Defendant contends that an experiment he conducted demonstrates that on February 5,
8 2008, the load vehicle did not appear heavily laden. He therefore argues the Court erred in finding
9 reasonable suspicion and probable cause. Defendant is in error since: (1) Agent Diaz’ observations
10 of the load vehicle, while helpful, are not material to the Court’s findings of reasonable suspicion
11 and probable cause; and (2) Defendant’s experiment is inherently unreliable.

12 **A. The February 5, 2008 Incident**

13 On the morning of February 5, 2008, Border Patrol Agent Jose Vasquez was operating in
14 a plainclothes capacity in Tecate, CA. Agent Vasquez was stationed in his unmarked vehicle in
15 the parking lot of a small strip mall on the east side of Tecate Road approximately 300 yards north
16 of the international border. Given its proximity to the international border, the area has proven
17 particularly susceptible to alien smuggling activity. In fact, Agent Vasquez has personally made
18 approximately 25 alien smuggling apprehensions in this particular area, and approximately 50
19 overall in the Tecate area.

20 On this morning, at approximately 8:00 a.m., Agent Vasquez observed an individual, later
21 identified as Defendant, walking through the parking lot to a convenience store. Defendant exited
22 the store shortly thereafter and walked through the parking lot. He then walked across Tecate Road
23 toward a parking lot on the west side of the road. This parking lot is commonly known as the
24 “Three Dollar Parking Lot.”

26 ^{2/} The Government will not seek to introduce evidence of Defendant’s post-arrest statements
27 or the smuggled aliens’ statements from the November 28, 2007 apprehension.

1 The Three Dollar Parking Lot has several features that make it advantageous for alien
2 smuggling: (1) its proximity to the international border; (2) the lack of fencing around the parking
3 lot; (3) the lack of security guarding the parking lot; and (4) the number and variety of vehicles and
4 trailers in the lot, as well as bushes surrounding the lot, which make for easy hiding places.

5 Agent Vasquez did not recognize Defendant as one of the local residents he encounters in
6 that area on a regular basis, so he exited his vehicle to maintain observation. He then watched
7 Defendant as he entered the Three Dollar Parking Lot. As Defendant entered the lot, he approached
8 a maroon Nissan Pathfinder parked there. Two men were standing on the passenger side of the
9 vehicle, and the vehicle's rear passenger-side door was open. Agent Vasquez observed Defendant
10 converse briefly with one of the men before they shut the passenger side door. Defendant then
11 entered the vehicle's driver seat, quickly exited the parking lot, and drove the vehicle north on
12 Tecate Road. At the same time, the two individuals who had been standing on the passenger side
13 of the vehicle began walking south on the west side of Tecate Road.

14 Agent Vasquez walked across Tecate Road and began following the two individuals. When
15 the individuals observed him, Agent Vasquez identified himself as a Border Patrol agent and
16 ordered them to stop. Both individuals ignored Agent Vasquez's commands and fled south toward
17 the port of entry. Agent Vasquez apprehended one of them, but the other escaped into Mexico.

18 The individual apprehended by Agent Vasquez identified himself as Francisco Nava-
19 Montenegro and admitted to being a citizen of Mexico without documents allowing him to enter
20 the United States. Nava-Montenegro informed Agent Vasquez that he had crossed into the United
21 States on foot with a group led by a guide.

22 Based on his observations and the information obtained from Nava-Montenegro, Agent
23 Vasquez requested that other Border Patrol agents perform an investigatory stop of Defendant's
24 vehicle. Agents Jorge Diaz and Robert Godreau responded in unmarked vehicles and encountered
25 Defendant's vehicle as it proceeded eastbound on SR-94. As Agent Diaz observed and followed
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1 the vehicle, he noted that the vehicle rode heavy and seemed to bounce. Both he and Agent
2 Godreau requested that a marked Border Patrol perform an investigatory stop.

3 Defendant shortly thereafter yielded to a marked Border Patrol vehicle being driven by
4 Agent James Napoli. Agents Napoli, Diaz and Godreau approached Defendant's vehicle. A strong
5 odor of glue emanated from the vehicle. The agents also heard movement inside the speaker box
6 behind the vehicle's rear seat. Defendant was then removed from the vehicle, and Agent Godreau
7 entered the vehicle through a rear door. As he entered, Agent Godreau could hear voices inside the
8 speaker box, and he observed movement through a small opening in the box. Agents folded down
9 the rear seats and opened the speaker box. Five people were concealed inside. All five individuals
10 admitted to being citizens of Mexico without documents allowing them to enter the United States.

11 **B. The May 30, 2008 Evidentiary Hearing**

12 At the May 30, 2008 evidentiary hearing on Defendant's Motion to Suppress Evidence the
13 Government called Agents Vasquez and Diaz, who testified consistent with the facts as stated
14 above. Defendant called the three material witnesses.

15 Following the testimony and argument, the Court denied Defendant's Motion to Suppress.
16 Specifically, the Court first found that the totality of the circumstances clearly established
17 reasonable suspicion that criminal activity may be afoot. In finding reasonable suspicion, the Court
18 cited: (1) the proximity of the Three Dollar Parking Lot from the international border; (2) the
19 history of alien smuggling activity in that parking lot; (3) the lack of fencing around the parking
20 lot, and the many bushes and vehicles there that allow for hiding places; (4) Agent Vasquez'
21 observations of Defendant walking through the shopping center parking lot to cross the street; (5)
22 Agent Vasquez' testimony that he observed Defendant speaking with two individuals within 1 to
23 2 meters of the load vehicle for brief, unanimated conversation; (6) Agent Vasquez' observation
24 that Defendant then climbed into the driver's seat of the load vehicle and drove away; (7) Agent
25 Vasquez' testimony that, in attempting to contact the individuals near the load vehicle, one or both
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1 of them fled; and (8) Nava's admission to Agent Vasquez that he is in the United States illegally.
2 [See Exhibit A, 101-103.]

3 The Court then further found probable cause to search the vehicle and subsequently arrest
4 Defendant based on the above facts, as well as Agent Diaz' observations of the load vehicle and,
5 after the load vehicle had stopped, his hearing the rustling in the back of the vehicle.

6 **C. Defendant's June 5, 2008 Experiment**

7 As reported in Defendant's Motion, following the evidentiary hearing, Defendant set out
8 to test Agent Diaz' claim that he had observed the load vehicle ride heavily and bounce unusually.
9 [Deft's Motion at 10-13.] To this end, Defendant enlisted an investigator familiar with viewing,
10 inspecting, and experimenting on vehicles.

11 For this experiment, Defendant's investigator apparently decided against using the actual
12 load vehicle. Instead, understanding that the load vehicle was a 2005 Nissan Pathfinder SE Four
13 Wheel Drive, the investigator performed his test on a 2005 Nissan Pathfinder SE Offroad Four
14 Wheel Drive. [Deft's Motion at Ex. B.] While Defendant cites a chart listing the maximum payload
15 for the standard models of these two vehicles, Defendant makes no documented effort to control
16 for, or even determine, the condition of the load vehicle, including wear on the shocks, as compared
17 to the test vehicle.

18 On June 5, 2008, the investigator measured the distance from the ground to the highest point
19 in the arc of the rear left wheel well of the test vehicle. Defendant offers no explanation for why
20 the investigator decided to measure from the arc of the rear wheel well, presumably right above the
21 rear shocks on the test vehicle, instead of from the rear bumper of the vehicle.

22 The investigator then loaded the test vehicle with a driver and five passengers, with the
23 passengers apparently loading themselves in the rear cargo area. Then, with the test vehicle still
24 stationary, the investigator apparently observed the arc in the left rear wheel well had fallen two
25 inches

D. The Court's Findings Were Not Contingent on Agent Diaz' Observations of the Load Vehicle.

As a general matter, "[r]econsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." School Dist. No.1J, Multnomah County, OR v. ACandS, Inc., 5 F.3d 1255, 1263 (9 th Cir. 1993).

Defendant's argument here hangs on the premise that the Court's findings of reasonable suspicion and probable cause were dependant upon Agent Diaz' testimony that he observed the load vehicle bounced and rode heavily. They clearly were not.

As noted above, in setting forth its findings, the Court referenced numerous facts and circumstances that established reasonable suspicion that criminal activity was afoot: (1) the proximity of the Three Dollar Parking Lot from the international border; (2) the history of alien smuggling activity in that parking lot; (3) the lack of fencing around the parking lot, and the many bushes and vehicles there that allow for hiding places; (4) Agent Vasquez' observations of Defendant walking through the shopping center parking lot to cross the street; (5) Agent Vasquez' testimony that he observed Defendant speaking with two individuals within 1 to 2 meters of the load vehicle for brief, unanimated conversation; (6) Agent Vasquez' observation that Defendant then climbed into the driver's seat of the load vehicle and drove away; (7) Agent Vasquez' testimony that, in attempting to contact the individuals near the load vehicle, one or both of them fled; and (8) Nava's admission to Agent Vasquez that he is in the United States illegally. [See Ex. A, 101-103.]

The Court then noted, *without yet referencing Agent Diaz' testimony*, that these factors collectively created reasonable suspicion to stop the load vehicle. [See Ex. A., 103:12-14.] Both the evidence and the record therefore clearly demonstrate reasonable suspicion to stop the vehicle irrespective of Agent Diaz' observations.

1 Agent Diaz' observation that the load vehicle was heavily laden is likewise immaterial to
2 the probable cause determination. After the load vehicle stopped, if Agent Vasquez' observations
3 had not already established probable cause to search it, Agent Diaz heard rustling in the back of the
4 vehicle as he approached it. Again, without regard to his observations of the load vehicle, once
5 Agent Diaz heard rustling underneath the speaker boxes in the back of the vehicle, the agents had
6 probable cause. Therefore, Defendant's experiment to test Agent Diaz' observations of the load
7 vehicle is irrelevant, and the Court should deny the motion.

8 **E. Defendant's Experiment Is Unreliable**

9 Even if Agent Diaz' observations of the load vehicle were material to the Court's findings,
10 however, Defendant's "new evidence" is inherently unreliable. It therefore offers nothing to
11 impugn Agent Diaz' observations and testimony.

12 **i. Defendant Chose Not to Test the Load Vehicle**

13 First, for reasons unexplained, Defendant chose not to test the actual load vehicle, a 2005
14 Nissan Pathfinder SE Four Wheel Drive, for his experiment. Instead he opted to test a different
15 vehicle, a 2005 Nissan Pathfinder SE Offroad Four Wheel Drive. While Defendant acknowledges
16 that the two vehicles have different payload capacities, Defendant offers no explanation for what
17 structural differences between the two vehicles account for the differing payload capacities, nor for
18 whether/how these differences would affect the rear view of the vehicle when weighted down.

19 More troubling, however, is the fact that Defendant makes no effort to determine and
20 control for the general condition of the load vehicle as compared to test vehicle. Even on a basic
21 level, Defendant offers nothing to demonstrate even that the mileage between the two vehicles is
22 similar, much less that he has attempted to control for the wear on the shocks of the two vehicles.
23 Absent such precautions, the experiment is inherently unreliable.

24 **ii. Defendant Did Not Measure From the Rear Bumper of the Vehicle**

25 Second, apart from not using the load vehicle, Defendant did not measure the test vehicle
26 from the area Agent Diaz was likely have been observing: the rear bumper. Instead, without
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1 explanation, Defendant measured the test vehicle from the top of the arc of the rear left wheel well
2 of the test vehicle – presumably the area right above the rear shocks on the vehicle.

3 The problem in using the wheel well for measurement is fairly straightforward: it minimizes
4 the height disparity Agent Diaz observed from the rear bumper of the load vehicle. The rear wheel
5 well rests just above the shocks and rear axle of the vehicle, both of which would minimize any
6 height disparity in that particular location of the vehicle. The rear bumper area, however, is
7 positioned farther from the rear axle and shocks, which should render more pronounced height
8 disparities, particularly if the weight is positioned toward the back of the rear cargo area. Since
9 Agent Diaz was likely watching the rear bumper in forming his observations, Defendant's recorded
10 measurements have little bearing on what Agent Diaz actually observed while following the load
11 vehicle on February 5, 2008.

12 **iii. Defendant Only Tested the Vehicle While It Was Stationary**

13 Finally, Defendant's experiment is undermined by the fact that he only tested a stationary
14 vehicle.

15 At the hearing, Agent Diaz testified that he and Defendant were driving eastbound on
16 Highway 94 when he observed the load vehicle bouncing and riding heavy. Defendant's
17 experiment, however, only measures the effect of a weighted rear cargo area on a stationary
18 vehicle. The experiment therefore does not and cannot capture the extent to which a weighted rear
19 cargo area adds to the "bounce" or response of a load vehicle in motion as the driver negotiates
20 bumps and turns on a highway. This is a significant omission, since common sense suggests the
21 effects of a weighted rear cargo area on a moving vehicle would be more pronounced and
22 discernable than on a stationary one. Defendant's experiment therefore cannot reasonably be relied
23 upon to undermine Agent Diaz' observations and testimony. The motion should therefore be
24 denied.

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III

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court deny Defendant's motions.

DATED: July 3, 2008.

Respectfully submitted,

Karen P. Hewitt
United States Attorney

s/ AARON B. CLARK
AARON B. CLARK
DAVID D. LESHNER
Assistant U.S. Attorneys

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Criminal Case No. 08-CR-0366-DMS
)
Plaintiff,)
)
v.) CERTIFICATE OF SERVICE
)
)
JAMES HAYNES, III,)
)
Defendant.)
_____)

IT IS HEREBY CERTIFIED THAT:

I, Aaron B. Clark, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of the **UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTIONS** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

David M.C. Peterson, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 3, 2008.

/s/ Aaron B. Clark
AARON B. CLARK